

15480

Ruprecht
PLI

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

[Request for Reconsideration]

FILE: B-194876

DATE: November 19, 1980

MATTER OF: Security Assistance Forces & Equipment
International, Inc. *DLG03851*

DIGEST:

1. Decisions on protests made by designee of Comptroller General are decisions at highest level available in General Accounting Office.
2. Contention raised for first time in request for reconsideration does not demonstrate error in fact or law in earlier decisions when that contention had not been presented for consideration.
3. Earlier decisions holding that agency's responsibility determination was proper will be upheld where agency acted reasonably and in good faith.

Security Assistance Forces & Equipment International, Inc. (SAFE), requests reconsideration of our decision in Security Assistance Forces & Equipment International, Inc.--Reconsideration, B-194876, July 28, 1980, 80-2 CPD 68. There we affirmed an earlier decision, B-194876, May 5, 1980, 80-1 CPD 320, which held that the Army acted properly in canceling solicitation No. DAJA37-79-R-0164 for a repair and maintenance contract on an executive nurse call system at the United States Army Hospital in Nuerenberg, Germany. *AGCO 020*

In making the original decision of May 5, 1980, we found that the Army acted reasonably and in good faith in determining that SAFE was nonresponsible. Upon subsequent reconsideration of that decision in light of SAFE's submissions, we rejected SAFE's contention that the preaward survey team would be conducting an unconstitutional search by requesting a site survey of SAFE's facility in Frankfurt, Germany,

~~013007~~ 113798

noting an earlier decision on the same issue involving SAFE, Security Assistance Forces & Equipment International, Inc.--Reconsideration, B-196008, June 5, 1980, 80-1 CPD 387. We therefore found SAFE failed to cooperate with the contracting officer.

Second, we rejected SAFE's contention that it was responsible, noting that SAFE was on notice that it had an obligation to affirmatively demonstrate its responsibility. Instead, we found SAFE failed to inspect the actual system installed in the hospital and failed to provide sufficient information concerning its ability to obtain spare parts.

SAFE now requests a reconsideration of our July 28 reconsideration, asking that it "be handled properly and at a higher level than that at which it has, to date, been handled." This decision and the prior two have been handled at the highest level available in that they are decisions of the Comptroller General, the highest official in the General Accounting Office, and have been made by his designee.

In its present request for reconsideration, SAFE contends that our decision of July 28, 1980, failed to take into consideration those same facts whose alleged omission in our decision of May 5, 1980, necessitated reconsideration initially. SAFE argues that the omitted facts show that it did not fail to cooperate in a preaward survey and that it affirmatively demonstrated its responsibility.

Specifically, SAFE first contends that refusal by the SAFE facility in Frankfurt, Germany (SAFE OHG), to consent to a site survey was justified, stating:

"* * * SAFE OHG is a free and independent company, though affiliated with SAFE International, it is in no way legally connected to SAFE International and did not commit itself to permitting (the officer conducting the preaward survey) * * * to visit the SAFE OHG premises in Frankfurt by virtue of SAFE International's having

state facts by which one could reasonably conclude he was responsible. Rather, this Office has repeatedly held that the protester has the heavier burden of showing that the contracting agency lacked any reasonable basis for making the determination or that the agency acted in bad faith. See the SAFE decision of May 5, 1980, supra, page 4, and McNally Pittsburg Manufacturing Corporation, B-191221, June 13, 1978, 78-1 CPD 432.

While SAFE has provided factual instances indicating its efforts to both cooperate and demonstrate its responsibility, it has failed to satisfy the legal requirement of showing that the contracting officer lacked a reasonable basis for making his nonresponsibility determination. Thus, it is not true that we did not weigh SAFE's various factual arguments. Rather, we found that SAFE failed to meet the burden required of those seeking to overturn an agency's responsibility determination.

For illustrative purposes, we will consider the merits of SAFE's new contention regarding the autonomous nature of its Frankfurt plant, which, as we noted earlier, was untimely raised.

SAFE states that SAFE OHG is a separate entity and that refusal by the OHG facility to permit a site survey by the contracting agency did not indicate a lack of cooperation on the part of SAFE International. We do not question SAFE's characterization of its business interests. Rather, we note that the contracting officer and the members of the preaward survey team acted reasonably in presuming that SAFE OHG would be actively involved in the performance of the contract. We point to the fact that SAFE International used and continues to use the SAFE OHG address in all correspondence related to this matter, including most significantly its initial offer. Second, the service contract was to be performed in Germany as the need for repairs arose. By using the mailing address of a German-based firm, SAFE cannot deny that it created an inference of ready availability, a most favorable inference when considering offers for repair services. Additionally, the record indicates that the preaward survey revealed SAFE's other known facility, located in Baltimore, Maryland, to be the address of a firm of accountants with no

demonstrable ability to perform the required services. From these reported facts, we do not find that the contracting agency was unreasonable in presuming that SAFE OHG would be the actual provider of the solicited services. Consequently, upon finding that OHG refused to permit a site survey, the Army did not act unreasonably in concluding that the offeror had failed to cooperate so as to affirmatively demonstrate its responsibility.

The only other basis recognized by this Office for overturning an agency's responsibility determination is a showing that the agency acted in bad faith. We have held that bad faith on the part of the contracting agency is not shown in the absence of irrefutable proof of malicious and specific intent to injure the protester. Arlandria Construction Co., Inc., B-195044, B-195510, April 21, 1980, 80-1 CPD 276. While SAFE claims that the Army made a "malicious" nonresponsibility determination, neither the request for reconsideration nor the existing record contains irrefutable proof of intent to injure. To the contrary, the record discloses that the contracting officer made reasonable efforts to determine SAFE's responsibility and proceeded to make a reasonable determination in light of all the evidence available to him.

For the foregoing reasons, our prior decisions are affirmed.

Harry D. Van Cleave

For the Comptroller General
of the United States